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(City and County—Organized 1888)

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The Radio Act of 1927

By W. JEFFERSON DAVIS *of the San Diego Bar*

Member Air Law Committee of the American Bar Association; author of Laws Over Wings, The World's Wings, Japan, The Air Menace of the Pacific, Air Commerce(in preparation), etc.

A system of law should keep pace with the economic development of the country. Recent developments in the use of the air, both as a means of transportation and a communication system, have been so rapid that the advent of each new vehicle of commerce was ushered in far ahead of rules governing same.

In sponsoring the passage both of the Air Commerce Act of 1926 and the Radio Control Law of 1927, the American Bar Association, through the adoption of a far sighted program, has minimized to a great extent the amount of attention this legislation would otherwise have required by members of the bar after its enactment.

The concerted efforts of the American Bar Association over a period from 1920 to 1926, resulting in the passage by Congress of the Air Commerce Act of that year, were regarded with such seriousness that the Association, at the Denver meeting last July, created a permanent Committee on Air Law, enlarging its duties to cover the subject of the law pertaining to aeronautics, radio, and other uses of the air. One of the functions of the committee, working in conjunction with the Secretary of Commerce, has been to assist in drafting regulations under the new Air Commerce Act. This work has now been completed, and the regulations of the Department of Commerce for the guidance and direction of the use of aircraft employed in interstate commerce have been promulgated. It can readily be understood that very important powers under the act are lodged in the Secretary of Commerce, and that such regulations will be the basis of control by the federal government, and the individual states, on the question of sovereignty, which they should and will exert over the air.

The Air Law Committee of the American Bar Association, following its policy in regard to the development of the law of aeronautics, conceived it to be its function, before the passage of the law, to advise with Congress regarding the law of radio control. Hearings of the committee were held in Washington last November, with a view to clearing up the then existing chaotic condition, which made necessary the passage of some law to replace the previous Act of 1912. As stated by President Coolidge in his annual message to Congress:

> "Due to the decisions of the courts, the authority of the department under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted."

When the Air Law Committeee convened at Washington in November, it developed from statements made to the committee by Senator Dill, and representatives of the Department of Commerce, that at that time there were in existence 612 broadcasting stations; that 70 new stations were being constructed, and 110 other stations were contemplated; that all of these stations were using, and intended to use, wave lengths 200 to 550. The testimony of experts showed that there were only 89 channels which could be used by all of these 612 existing stations, and the 180 or more contemplated stations (there are six other channels, but these have been allocated to Canada). It was very obvious to the committee that there were too many broadcasting stations operating, and about to be operated, and that interference was unavoidable, if these stations were permitted to operate at the same time.

Under the Act of August 13, 1912 (9 Fed. Stat. Ann. 2nd Ed., page 523), the Secretary of Commerce had no discretion in issuing licenses. This was the opinion of the court in the case of Hoover vs. Intercity Radio Company, 286 Fed. 1003. The Secretary of Commerce had refused to grant an application for a license to a new operator on the ground that there was no available wave length which could be assigned to a new station, without interfering with some former assignment. The court held, just as the Attorney General had previously ruled (29 Opinions of Attorneys General, 579) that the Secretary had no discretion, and that therefore mandamus would lie to compel the Secretary to issue the license.

The 1912 statute was very simple. It comprised eleven sections, and included in the fourth section of the act, nineteen regulations. Section 1 provided for the issuance of licenses, and Section 2 that the license should state the wave length authorized for use. The case of United States vs. Zenith Radio Corporation, 12 Fed. (2nd) 614, held that operation upon a wave length, other than the one assigned in the license, did not subject the operating company to the penalties provided in the first and second sections of the act.

The decision of Chancellor Wilson, in the case of Chicago Tribune vs. Oak Leaves Broadcasting Station, showed clearly that the law of 1912 was inadequate to deal with the situation. In this case the broadcasting company, operating station WGES, had commenced broadcasting on a wave length then used by WGN, which had been in existence for several years. The court held:

> "We are of the opinion further that under the circumstances of this case *priority of time creates a superiority in right* and the fact of priority having been conceded by the answer, it would seem to this court that it would be only just that the situation should be preserved in the status in which it was prior to the time that the defendants undertook to operate over or along the wave length of the complainant."

It can readily be seen that the listening public was primarily interested in having many of the existing stations shut down, to insure less interference and therefore better reception. The Air Law Committee reached the conclusion that neither the Dill Bill nor the White Bill exactly met the problem presented, and recommended legislation providing for the closing up of superfluous stations, and the payment of "just compensation" to such stations, by taxing the remaining stations. Through the passage of the present law, the chaotic condition existing when Congress convened in December, has, to some extent, been cleared up, but under the present legislation there is no power given either to the commission, or to the Secretary of Commerce, to close up existing stations, and likewise there is no provision for compensating stations whose licenses are not renewed.

In urging the incorporation of provisions permitting either the commission or the Secretary of Commerce to close stations entirely, and to pay compensation, the committee felt that the companies securing the new license when thus limited, would benefit by the closing of many of the present existing stations. From the larger profits, which would then accrue, they could very properly be taxed in order to pay compensation to the stations which would be closed. In considering the amount of compensation, the element of good will, of course, was taken into consideration, and the suggestion made that a Compensation Board be created to administer these provisions of the law. In advocating these provisions in the law, the committee felt that the then existing situation could be dealt with adequately only by limiting the number of licenses, and realizing that the listening public would be benefited by having fewer and better stations, in that interference would be reduced to a minimum, desired the passage of a statute which would be clearly constitutional. These suggestions the committee believed to be sound in law for the following reasons:

> "(*a*) The 1912 statute permitted every one to obtain a license.
>
> "The Secretary had no discretionary power and he could be mandamused to compel the issuance of a license. The licenses were not for any stated term and could be revoked only for cause. The companies with established business under such a situation had a right to believe that their investments could

not be destroyed by the mere repeal of the 1912 law.

"(*b*) The situation is not analogous to the destruction of property rights involved in the passage of the prohibition laws, because in that case there were very large moral and police questions, and besides the laws were only passed after the Constitution itself had been amended.

"(*c*) The obligation of the federal government to pay just compensation for closing an existing radio station was recognized in the joint resolution of July 16, 1918, which permitted the President to take over radio stations during the time of war, but only upon payment of just compensation. It is to be noted that even when this power was repealed on July 11, 1919, the compensation provisions were specifically continued.

"(*d*) The committee sees no newer constitutional authority for depriving the citizens of property rights under the pending legislation than was included under the 1912 legislation.

"(*e*) The closing of stations by mere refusal to issue new licenses under the new legislation would be an indirect method of attempting to accomplish a beneficial result that had better be dealt with directly and by specific authority of law.

"(*f*) The suggestion is entirely in accordance with Chancellor Wilson's decision in the Chicago Tribune case.

"(*g*) The Secretary or the commission will avoid extended litigation and be able to procure advantageous results more promptly if he or it has the right and the obligation to pay compensation to the stations which are closed.

"(*h*) The suggestion seems to us eminently fair and must appeal to the general public, to the stations which are closed and to the stations which are permitted to continue to operate, as being reasonable and just.

"In making this suggestion we are not unaware of the fact that the licensees who are permitted to continue will altogether have complete use of the channels of radio communication, to the exclusion of all others. We do not fear a criticism of a monopoly where there are three or four hundred different parties enjoying the monopoly. The limitation of the number of broadcasters, we believe, is necessary, just as the limitation of the number of telephone companies is necessary for the public convenience, and would be just as sound constitutionally as the limitation of use of certain highways to certain classes of vehicles.

"The suggestion of compensation provisions is in accordance with the provisions of the various bills which have contemplated compulsory consolidation of the railroads. Security holders of railroads to be taken over by other roads were to be paid by the acquiring roads.

"We see no objection to the signature of the resolution which was passed at the last session, providing for the waiver of rights as against the United States as a condition precedent to the granting of a new temporary license. We should like to see a resolution promptly enacted prohibiting the issuance of any new licenses for the time being and until the Congress can pass adequate legislation. We recommend this because the situation is growing worse steadily, due to the increasing number of licenses that are being issued.

"You will note that in making these observations we have done so from the point of view of the listening public primarily, all in the interest of what we believe would be for the benefit of better reception and better programs. We do not consider it our function to take into consideration the difficulties of securing the passage of this or that bill nor the compromises which generally have to be made to secure the passage of any bill. We are not unaware of those difficulties, but it seems to us that the proper function of the American Bar Association's Committee is to tell the legislators what we think of the proposed legislation strictly from the lawyer's point of view.

"In summary permit us to state that we believe that either of the bills would be an improvement over the existing situation, but only in respect to future licenses. On the other hand we think that neither bill deals, except by indirection, with the present condition, which the Secretary of Commerce says is chaotic.

"The committee believes that if its

suggestions are followed there will be a greater justification for more complete regulation of the broadcasters and that the situation from the point of view of the listeners will be greatly improved."

The Radio Control Bill, as passed by Congress and signed by the President, is very frankly a compromising solution, and while not entirely adequate, it does, to some extent, represent a very substantial advance over the old law of 1912. It provides adequately for dealing with future stations, and by indirection meets to some extent the problems now confronting broadcasting.

The Radio Control Law has cured many of the defects in bills formerly proposed:

First: The preamble has omitted the declaration of ownership of the ether, and is proceeding properly under the commerce clause of the constitution. The fundamental principle of the law, however, remains the same as expressed in the 1912 law.

> "No person * * * shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this act and with a license in that behalf granted under the provisions of this act."

The corresponding paragraph of the 1912 law reads as follows:

> "No person shall use or operate any apparatus for radio communication as a means of commercial intercourse except under and in accordance with a license revocable for cause in that behalf granted by the Secretary of Commerce on application therefor."

The language in both acts is similar in thought and the new law merely changes the details of administration.

Second: The license term has been fixed under the new law at three years instead of two.

Third: While there seems to be no provision for forfeiture of license for transfer for more than the value of the physical equipment, there is a limitation of the right to transfer a license, and the commission might properly decline to acquiesce in such a transfer for any reason which it may consider proper.

Fourth: Navy stations are permitted to transmit newspaper and other private commercial messages at reasonable rates, but this provision is permissive only until such time when there are privately owned facilities for such business.

The law provides for a commission to operate for the first year. Thereafter the Secretary of Commerce will handle most of the problems which will arise, and the commission will probably function only occasionally. It will be noted particularly:

1. That the present law does not follow the suggestion of the Air Law Committee that the anti-monopoly provision be eliminated. The committee believes, and recommended, that it is not the best legislative policy to incorporate in a regulatory measure provisions that either parallel, or duplicate, the Sherman and Clayton laws, with respect to monopoly or limitation of competition. Such a provision is in effect an additional penalty for the endorsement of the Sherman and Clayton laws, and in the judgment of the committee, has no place in a radio regulatory act.
2. That no power is given either to the present commission, nor, when the commission ceases to function, is any power lodged in the Secretary of Commerce either to close up existing stations or compensate stations whose licenses are not renewed.

The procedure contemplated by Congress apparently is for the commission, or the Secretary of Commerce, to obtain a waiver with each application, and then, having the waiver, decline to issue the license. The language in the laws reads as follows:

> "No station license shall be granted by the commission or the Secretary of Commerce until the application (sic) therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Very obviously, the present operators of broadcasting stations either have rights, or they have no rights. It is quite clear also that Congress, in the passage of the present law, recognizes that they have certain rights, or the waiver thereof would not be a condition precedent to the granting of a license.

(Continued on Page 25)

In re Campaign for Municipal Court Judgeships

By E. NEAL AMES *of the Los Angeles Bar.*

Chairman of Personal Contact Finance Committee of Bar Association Judiciary Campaign

To the Members of the Los Angeles Bar:

On May 3rd will be held the primary election, at which the citizens of Los Angeles will select the judges for the Municipal bench. The members of the Bar are well aware of the fact that there are 24 offices to be filled and that there are contests for only eight of these judiciary offices.

There is undoubtedly no group of citizens who, by reason of their daily activities and their close connection with the courts, are more deeply interested in the selection of capable men as judges than are the attorneys of Los Angeles. The reason is obvious. Business activities are being so circumscribed by legislation that men in every walk of life, profession and occupation find it necessary to continually ask their attorney for advice as to what they can legally do and as to when they are in danger of violating some legislation, either local, state or national in its source. In other words, by reason of the voluminous legislative program which has been carried on by the lawmaking bodies, the attorney has become a necessary factor in all business activities. In order for him to be of assistance to his clientele there are two things that are necessary: First, he must be conversant with the legislation enacted; and second, he must be able to determine with some reasonable degree of certainty that the courts will interpret and define the laws in accordance with the principles of justice and equity which is the foundation of Anglo-Saxon jurisprudence.

The first obligation which rests upon the attorney is purely personal. The second is measured by the integrity and ability of the men selected to sit upon the bench. It is because of this fact that the attorneys as a whole feel that they owe a duty, not only to themselves as officers of the court, but to their clients as well, that men are selected for the bench who are qualified to hold these important positions of trust.

The people of the State of California have determined upon the selection of judicial officers by means of election instead of appointment. There is no system of selection of public officers that is free from defects, the problem being to endeavor to secure that system of representative government which nearest approximates the objective sought; namely, the securing of men upon the bench who are free from any personal alignment or influence which would prevent their performing their duties in a fearless and conscientious manner.

It would be useless for me to enter upon an academic discussion of the importance of the judiciary under our system of government. Suffice it to say that our system of civilization is based upon the proper functioning of the courts of justice and the whole program of law and order is based upon the just and certain meting out of punishment to those whom we classify as criminals. The delays in the handling of civil matters in our Superior Court have brought into existence the Municipal Court, judges for which will be selected upon May 3rd. At the present time the Superior Court, despite the relief secured by the formation of the Municipal Court, is now more than a year behind in its calendar and the District Court of Appeal is more than four years in arrears. This fact has made it impossible for men to transact business and feel as though they are secure, because whenever there is a dispute followed by litigation, the ultimate determination of the issues is postponed from two to six years, all depending upon the financial ability of the litigants to prosecute the matter through the higher courts. This has forced litigants, who are not able to finance a long drawn out legal fight, to either forfeit their rights or at best compromise them in order to secure even meagre justice. Thus it is of vital importance that the men upon our bench are men whom we have every reason to believe will consider the rights of the poor man with the same degree of

equity and consideration that would be granted to those who are prepared to finance long drawn out litigation and are capable of reaching just and equitable decisions.

The tests of a judge are, first—integrity, second—ability.

It is undoubtedly possible, out of the several thousand attorneys in Los Angeles, to name four or five complete tickets and secure upon each, 24 men who would be qualified to act in the capacity of judges upon the Municipal Court bench. The one difficulty which the voter has in selecting these candidates is to secure information in regard to the qualifications and the character of the men seeking judicial preferment. There is no group of men who are, by occupation and by training and ability any better able to ascertain the character and the qualifications of a candidate for the bench than are the attorneys. The same is true in all professions. Doctors are more qualified to determine the ability of their associates than are the laity. The same is true of the ministry. The same is true among artisans of all classes.

The Bar Association has for the past two or three years conducted a plebiscite, not with the idea in view of conveying the impression that the men selected by the bar are the only ones who could qualify for the position, but that as regards the men who have offered themselves to the public as candidates, the consensus of opinion among the attorneys is that those selected at the plebiscite are the best qualified. You will undoubtedly recall that at the time of the formation of the Municipal Court there were more than 108 candidates for five places on the Municipal bench. A plebiscite was taken, at which the attorneys expressed their opinions as to the qualifications of the candidates. Later the same course was pursued in the matter of the selection of judges for the Superior bench. Each time between 1000 and 1200 attorneys have cast a secret ballot, expressing their opinions as to the qualifications of the respective candidates and one of the remarkable facts has been the degree of unanimity of opinion among the members of the bar as to the qualifications and ability of candidates for the bench. No system of plebiscite can be worked out that is perfect. The nearest that we can

do is to approximate the result desired.

Those who have been conversant with campaigns for judicial offices are well aware of the fact that it is impossible for a candidate for judge on the Superior bench to wage a campaign with any degree of publicity without the expenditure of from $5,000 to $10,000. This is because of the large number of voters and because of the tremendous area that is covered by the judiciary of our state courts. The City of Los Angeles has been steadily growing, until it is gradually approximating the territorial limits of the county and contains a majority of the registered voters, so that the problem confronting the Municipal Court judges is practically the same as that confronting the judges of our Superior Court. The Bar Association realizes that the first class called upon by judicial candidates are the attorneys. Their names are solicited for endorsements. The incumbents always have a decided advantage, because it takes moral courage for attorneys to refuse to allow their names to be used in support of a judge. However, this matter has become a matter of such concern to the leaders of the profession that scores of the leading attorneys have made it a matter of policy to refuse to allow their names to be used by any candidate, or have, on the other hand, selected three or four and given their support to those particular candidates.

Along with the request for endorsement has come the request for funds, and the attorneys have not been in a position where they could finance campaigns for twenty or thirty judges in their races for the Municipal Court. The attorneys do not feel that it is incumbent upon them to finance these campaigns, and yet the system of election of judges makes it compulsory upon the part of the candidates to secure financial assistance from whatever source possible. Under the provisions of the plebiscite the secret endorsement is given, so that no judge knows who votes for or against him and every attorney is given an opportunity to express his candid opinion in regard to the candidates and their qualifications as judges, knowing that no one will know how he has cast his vote.

Under the plan of a concerted support of the candidates endorsed, each attorney knows that any donation of moneys given will be used toward furthering the campaign of all, and he will not be placed in the position of declining to assist this judge and helping some other judge. In other words, the judiciary will be free from any political or personal obligations to any particular attorneys or groups of attorneys by reason of endorsement or financial support, which condition of mind is most desirable from the standpoint, not only of the judge but of the litigants. I wish to call the attention of the bar to the fact that under normal conditions, were it not for the plebiscite which has registered a decided disapproval of the attempt upon the part of attorneys to secure publicity by means of political campaigns, the voters of the City of Los Angeles would undoubtedly have been forced to choose between more than one hundred candidates for offices upon the Municipal bench.

Each candidate would have been soliciting funds. Each candidate would have had his own coterie of friends, and the man who could secure the most financial support and could get his campaign before the public, irrespective of his qualifications, would stand the best chance of election.

The Bar Association plebiscite does not in any way preclude men of ability and integrity from entering the campaign for judicial honor. Men of this calibre, when they have failed to secure the support of the Bar, will undoubtedly follow the policy of John Luter, Hugh Dickson and Earnest K. Mane. These men, upon failing to secure the endorsement, have withdrawn from the race, leaving the field open to the men to whom the attorneys as a whole have given their endorsement. This may not necessarily mean that the men who received the support of the bar are better qualified than the men who have thus magnanimously withdrawn from the race, but it simply does establish the fact that there are a greater number of attorneys who know the qualifications of the men who have secured the endorsement and who have vouchsafed to the general public that the men endorsed by the Bar Association are qualified.

Under the campaign outlined by the Bar Association, there is an attempt to assist the attorneys to reach their clientele by means of personal letters. Also there will be an attempt to reach every voter in the City of Los Angeles with a list of candidates who have been endorsed by the Bar

Association. The fact that fifteen judges are unopposed and are therefore able to give the major portion of their time during this campaign period to their official duties has undoubtedly meant a saving of thousands of dollars to litigants and has prevented the congestion which always surrounds an election period. Also because of the attitude of the attorneys, as expressed by the plebiscite, almost all of the contested elections will be settled at the primaries, thus eliminating the burden and expense of a second campaign and also the loss of time which such a campaign naturally entails upon a judge who is seeking election. Under the campaign mapped out by the Bar Association, the money expended for the twenty-four candidates will be less than would be normally spent by a single candidate for office; and, if the attorneys and the general public will co-operate, it will be simply a question of time until every attorney will know that if he cannot secure the support and the endorsement of a majority of the attorneys who are practising before the bar, he need not hope to get the support of the general public. There will always be men who will engage in their own campaign. Individually, we may believe that they are better qualified than some of the candidates who have been endorsed by the Bar Association. There is probably no one who, if he were called upon to name a complete list of candidates, would name the twenty-four endorsed by the Bar Association, yet this opinion is a composite opinion of the best judgment of over a thousand men who are personally acquainted with the men endorsed. True, they do not know all of them, but every affirmative vote is a conscientious endorsement of the qualifications of the candidate endorsed. It will be but a question of time until there will be more than thirty Municipal judges and the number of Superior judges will be increased to probably 36 or 40. The business of Los Angeles County demands the increase. With the increase comes an added burden upon the attorneys in assisting the public in keeping from the bench men who are not qualified. The only way that this can be accomplished is by the concerted effort of the Bar Association by means of a plebiscite along the general lines and plan now followed.

(Continued on Page 27)

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Los Angeles Bar Association Monthly Meeting and Dinner

Hotel Alexandria, Thursday, April 28th, 1927, 6:00 P. M.

The regular monthly meeting of the Los Angeles Bar Association will be held at the Alexandria Hotel on Thursday, April 28th, 1927. The meeting will be presided over by W. J. Ford.

Mr. Rollin L. McNitt, Dean of the Southwestern University of Law School and Chairman of the Los Angeles City Planning Commission, will deliver an address on important phases of the zoning problem. Mr. McNitt is peculiarly fitted to talk on this subject, by reason of his experience on the Planning Commission.

The following Bar Association candidates for the Municipal Court, who are opposed at the coming election, will be the guests of the evening: Hon. Louis P. Russill, Hon. Chas. B. MacCoy, Hon. Chas. E. Haas, Hon. Georgia P. Bullock, Hon. Guy F. Bush, Hon. Leonard Wilson, Hon. R. Morgan Galbreth and Mr. Dudley S. Valentine.

R. H. F. VARIEL, Jr., *Secretary.*

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912, of the Bar Association Bulletin, published semi-monthly at Los Angeles, California, for April 1, 1927.

State of California }
County of Los Angeles } ss.

Before me, a Notary Public in and for the State and County aforesaid, personally appeared Chas. L. Nichols, who, having been duly sworn according to law, deposes and says that he is the editor of the Bar Association Bulletin and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, Los Angeles Bar Association, 687 I. W. Hellman Building, Los Angeles. Editor, Chas. L. Nichols, 535 Title Insurance Building, Los Angeles. Associate Editor, R. H. Purdue, 535 Title Insurance Building, Los Angeles.

2. That the owner is: (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding one per cent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a firm, company, or other unincorporated concern, its name and address, as well as those of each individual member, must be given.)

The Los Angeles Bar Association, an unincorporated association, composed of members of the Los Angeles City and County Bar. Address: 687 I. W. Hellman Building, Los Angeles California.

3. That the known bondholders, mortgagees, and other security holders owning or holding one per cent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.)

None.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date shown above is—. (This information is required from daily publications only.)

CHAS. L. NICHOLS.

Sworn to and subscribed before me this 28th day of March, 1927.
(Seal)

HOWARD PROWSE,
Notary Public in and for the County of Los Angeles, State of California. My commission expires Dec. 28, 1927.

THE ADVENT OF AN ENLARGED DEPARTMENT

It is with considerable pride and with the realization that the news will be well received by the members of the Bar Association that the BULLETIN announces the development and enlargement of its department "Case Notes."

The department will hereafter be conducted by Mr. William E. Burby of the faculty of the University of Southern California School of Law. In training and ability, Mr. Burby is signally well qualified for the editorial work which he has so generously undertaken. He has been a member of the University of Southern California Law School faculty since last September, his special field being the subjects of Real Property and Torts. He is a graduate of the University of Michigan, having received the degrees of A. B. with distinction (1917) and J. D. (1922). He was Associate Editor of the Michigan Law Review in 1920 and 1921, and is a member of the Michigan Chapter of the Order of the Coif. Prior to coming to Los Angeles, Mr. Burby was for two years Professor of Law at the University of Notre Dame and for two years Professor of Law at the University of North Dakota.

Five months ago, "Case Notes" was inaugurated as a regular department of the BULLETIN by Mr. Albert E. Marks of the Los Angeles Bar, and the helpfulness of the notes which have since that time been prepared or secured by Mr. Marks have elicited much favorable comment on the part of our readers. It was realized, however, that an opportunity existed for the enlargement of the department in scope and usefulness; but such enlargement involved the spending of time and effort on the part of the "Case Notes' " editor to an extent such as he felt the demands of his practice would not permit. Very happily, though, the problem has been solved by Mr. Burby's consenting to assume active charge of the department. It is with appreciation for and recognition of the able fashion in which "Case Notes" has been conducted in the past that the BULLETIN hails the advent of the development and augmenting of the department.

This enlargement, and the recent inauguration of the department, "Book Reviews," which is being conducted in a capable and scholarly fashion by Mr. Harry Graham Balter of the Los Angeles Bar, are important forward steps toward the ultimate goal to which the editors of the BULLETIN aspire—the making of the BULLETIN an indispensable factor to the members of the Los Angeles Bar Association.

The plan tentatively contemplated for "Case Notes" calls for the review of numerous decisions of the California Appellate Courts and of the United States Supreme Court, and for comment concerning, as well as review of, some of the more outstanding decisions. It is anticipated that thereby the value and benefit of the BULLETIN will be immensely increased. Such a program cannot be accomplished, however, unless the department receives the support that it merits, and Mr. Burby accordingly urges that attorneys, law professors throughout the city, and law students co-operate by mailing to him reviews and comments. In this way only can the success of the plan be achieved.

The exactions of the class room and of the practice of law are strenuous, so that it is only at quite a personal sacrifice that Mr. Burby has assumed charge of "Case Notes." The spirit of service to fellow members of the bar and of loyalty to the profession which motivated his decision is a notable instance of the splendid aid and co-operation through which alone the achievements of the BULLETIN are being made possible.

And of this assistance, especially meritorious has been the support accorded by members of the faculties of law schools in Los Angeles. The BULLETIN takes this opportunity of expressing its thanks and the thanks of the Bar Association not only to Mr. Burby but to other professors of law who have from time to time contributed valuable treatises for publication: to Messrs. William Turney Fox, Reuel Leslie Olson and Claire T. Van Etten of the faculty of the University of Southern California School of Law; to Mr. Leon R. Yankwich, Professor of Law, Loyola College; and to Messrs. Rollin L. McNitt and Earle Kezartee Stanton, Professors of Law, Southwestern University.

By the efforts of these men and others is the BULLETIN being builded.

Case Notes

WILLIAM E. BURBY *of the Los Angeles Bar*
Professor of Law, University of Southern California

TELEGRAPH COMPANIES — CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

A particular phase of the ever-present question of securing proper articulation between federal and state governments, is considered in *Postal Telegraph-Cable Company*, Petitioner, v. *Railroad Commission of the State of California*, 73 Cal. Dec. 254 (Feb. 19, 1927).

The Postal Telegraph-Cable Company, petitioner, constructed a line from Niland through Brawley, Imperial and El Centro, to Calexico, known as its Imperial Valley extension, and opened offices in the places mentioned. The respondent Railroad Commission, of its own motion, and assuming to act under the provisions of section 50, subdivisions (a) and (b), of the Public Utilities Act (Stats. 1915, p. 115; amended Stats. 1917, p. 168) instituted an investigation into the construction of the line and the business over it. After due hearing, it made an order that the Telegraph Company cease and desist from the operation of the line for intra-state business unless and until it had secured a certificate that the present and future public convenience and necessity required, or would require, such operation. Action was brought in the instant case to determine the validity of that order.

The sole issue to be considered in the case was stated by the court as follows: "Can the Postal Telegraph-Cable Company, after it has lawfully constructed its line from Niland to Calexico, for the construction of which no certificate from the Railroad Commission was necessary, be forced to let the line stand idle, in so far as California intra-state business is concerned, unless and until it secures a certificate of public convenience and necessity for the transaction of such business?"

In answer to this question, the petitioner contended that the provisions of the Public Utilities Act relied on by the respondent, if applied to petitioner, and the order of the Commission, violated its rights under the Federal Constitution and the statutes enacted by Congress pursuant thereto. In making this contention it relied, first, upon the fact that it was lawfully within this state and carrying on its business under a "federal franchise," from which it contended that it was beyond the power of the state in any way to interfere with its operation. It was found that petitioner was in possession of a federal franchise consisting of rights and privileges under Congressional legislation in pursuance of section 8 of article 1 of the Constitution of the United States which provides that "The Congress shall have power . . . to establish post offices and post roads," and that, by the act of Congress, and its acceptance by petitioner, the latter became an instrumentality of the United States in carrying out its governmental functions.

Referring particularly to the provision of the United States Constitution that "the Congress shall have power . . . to establish post offices and post roads," the court stated: "Under this provision the authorities seem conclusively to establish that the power of the national government is exclusive, subject to the right of the state, under its police power, to make certain reasonable regulations as to the manner in which the business of the telegraph company shall be conducted. The order here sought to be annulled amounts to an injunction entirely suspending the doing of intra-state business over the Imperial Valley extension of the Telegraph Company's line. It does not, therefore, find support in

the exercise of the police power to regulate, but amounts to an attempt to exercise a power to prohibit. For this reason, the order of the Commission and the provisions of section 50 (b) of the Public Utilities Act, if applied to the petitioner here, violate petitioner's rights under the Federal Constitution and the act of Congress which give effect to its provisions relating to post offices and post roads."

A further point in the case was that a telegraph company which has acquired rights under section 536 of the Civil Code is not obliged, by the adoption in 1911 of amendments to the state Constitution and the enactment by the legislature of the "Public Utilities Act" (Stats. 1911, Extra Session, pp. 18, 43), which expressly added section 50 (b) requiring a certificate of public convenience and necessity from the Railroad Commission as a condition precedent to the exercise by a public utility of franchise rights, to secure a certificate of public convenience and necessity upon each extension of service. Concerning this subject the court said: "In view of the nature of the business of the Telegraph Company, and the broad and unrestricted terms of the offer contained in section 536, which has not been withdrawn or modified, we find no ground for the contention that each act of constructing a telegraph line, or an extension of service, was to constitute an acceptance pro tanto. The offer was intended to be, and was, accepted in its entirety as made. Petitioner has now exactly the same rights under its state franchise that it has had from the time it constructed and began to maintain and operate its first telegraph line within the borders of the state. The grant, resulting from the acceptance of the state offer, constituted a contract between the Telegraph Company and the state, secured by the Constitution of the United States against impairment by any state legislation."

R. L. OLSEN.

PLEADING COUNTERCLAIM

In the case of *Bandy v. Westover*, et al., 73 Cal. Dec. 91 (Jan. 7, 1927), the Supreme Court had before it the question as to whether or not in an action brought to secure the cancellation of a deed alleged to have been executed, among other grounds, through fraudulent misrepresentations, one of the defendants could recover by counterclaim expended by him in connection with the deal.

The court, no doubt, arrived at a correct result since a several judgment between plaintiff and defendant could not be recovered as required by Sec. 438 C. C. P. As the court points out, "The judgment has two lines of adjudication within it, one confirming the land transaction and the other a judgment for money due upon a contract." So, the counterclaim, if allowed, would not in any way have qualified or defeated the judgment to which the plaintiff would have been entitled had she succeeded, and this is one of the things that a counterclaim should do if we are to follow its development from the common law doctrine of recoupment.

While the result is justified on the foregoing principles, it seems that the court has developed a new and additional requisite that must be satisfied before a counterclaim can be maintained if it is based on Sub-division One of Sec. 438 C. C. P. Of course, under this sub-division defendant must show that his counterclaim is one, "arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action." The court takes the position that it is not sufficient that defendant's counterclaim arise from the same transaction that plaintiff's claim rests upon, but that it must also arise from the same "foundation." It is submitted that *the transaction on which the plaintiff bases his action is its foundation*, and that neither the language nor the purpose of the section, nor the cases on which the court relies, justifies the interpretation the court places upon it. Such a construction can only lead to uncertainty and confusion in an already complicated and involved field of pleading and result in limiting the use of the counterclaim far more than was originally intended.

W. T. F.

DOMESTIC RELATIONS

Appeal from an order reducing the amount of alimony from $45.00 per month to $30.00. H, a man thirty-three years of age and earning $160.00 per month, was desirous of marrying again. W was a trained nurse and ordinarily was able to earn money for her own support. However, W was temporarily unable to work because of illness; otherwise she was an ordinarily healthful person. W made no attempt to seek employment as a nurse or in any other capacity. Upon appeal the order was affirmed. *Lamborn v. Lamborn*, 52 Cal. App. Dec. 74.

It is well settled that the amount to be awarded as permanent alimony is a matter within the reasonable discretion of the court under the circumstances of each particular case, (*Farrar v. Farrar*, 41 Cal. App. 452) and it is equally well settled that there is no one rule whereby the discretion of the court may be measured or controlled. (*Anderson v. Anderson*, 124. Cal. 48.)

In the Lamborn case, the court showed a commendable spirit of realism in dealing with one of the most fragile and brittle of human relationships. Science and modern psychology are compelling a revaluation of the marriage status and all its incidents.

In awarding alimony, there is necessarily a latitude of discretion to be exercised by the trial court and before an appellate court will interfere, there must be a clear and convincing showing of an abuse of discretion on the part of the trial court. In the Lamborn case, the appellate court was of the opinion that there had been no abuse of discretion. "Where the ex-husband is earning wages by daily labor, a trial court, in awarding alimony, should not do so in a sum inducing idleness on the part of the ex-wife. Where there are no children involved and the parties are both young in years, the trial court may take into consideration, in awarding alimony, the possibility, probability and desirability of allowing the respective parties to establish an-

other and, perhaps, more congenial home."

Facing the facts of modern industrial life, the court further said: "The prevalence of divorces may well call for judicial support of the institution of marriage and we cannot say it is an abuse of discretion for a trial court to admit testimony and consider proof relative to future marriage. . . The change in the industrial world which has taken place in the last few years, presents to the trial court many matters for consideration and calls for the exercise of its discretion in awarding alimony. Thousands of women and girls are now employed, where formerly men and boys were once found."

By way of contrast, there should be noted the dictum of the court in the case of *Dietrick v. Dietrick*, 134 Atl. 338 *(Bar Association Bulletin*, Feb. 3, 1927, Page 26) which would cast upon the ex-husband the burden of paying some measure of alimony to his ex-wife who made a financially unfortunate choice of a second husband.

ALBERT E. MARKS.

DAMAGES—FAILURE TO DELIVER TELEGRAM

Oakland Baseball Club delivered to defendant telegraph company the following message to be transmitted to the plaintiff: "Pete McKenry, Baseball Pitcher, Fresno, Cal. (Personal). If free to sign, wire terms to Oakland Baseball Club." Through negligence on the part of the defendant the message was not delivered. Plaintiff claims damages alleging that, as a result of this negligence he failed to secure a position as a pitcher for the season, at a salary of $600 per month. Held, for defendant. *McKenry v. Western Union Telegraph Co.*, 52 Cal. App. Dec. 414 (Feb. 8, 1927).

The result reached by the court is probably supported by the weight of authority. It is submitted, however, that the reasons advanced for the decision are illogical, and that the result reached is unjust. One reading the opinion gathers the impression that the court denies recovery on the theory that the action is one based upon contract and the measure of damages as applied in contract cases would limit recovery to damages which could be considered as reasonably within the contemplation of the parties. This impression is strengthened by a statement found in the opinion that "Primarily, the first element of those damages (which the plaintiff would be entitled to recover) is the amount paid for the transmission of the telegram." Upon what theory, other than that for breach of contract, could the plaintiff be entitled to recover the cost of sending the telegram? If the action was one brought by the sender, he would, of course, be entitled to recover at least the consideration paid for the transmission of the message; but the action in the instant case was brought by the sendee and not the sendor. A possible theory would be that the contract was one made for the benefit of a third party (the plaintiff), but this is not even suggested by the court. Also, it is to be noted, the court cites with approval the celebrated case of *Hadley v. Baxendale*, 9 Exch. 341, which was an action brought for *breach of contract*, and the rule was there announced that in contract actions recovery would be limited to damages which could be considered as reasonably within the contemplation of the parties.

In the instant case it is stated, "The plaintiff's complaint properly sounds in tort,....." The defendant, because of the nature of its business, owes a public duty to use reasonable care in the transmission of messages. A violation of this duty is a tort, and the measure of damages as applied in tort actions should measure the liability. In such a case the plaintiff should be allowed to recover for all the natural and probable consequences of the defendant's negligent act. The question as to whether or not the damage suffered was "within the contemplation of the parties" is foreign to the issue.

The reason usually advanced for denying recovery in cases where the facts are similar to those in the instant case is that the damage claimed is too remote, uncertain, and specu-

lative. The telegram was not a definite offer of employment and it is uncertain whether or not the plaintiff would have secured the position if the telegram had been properly delivered. Johnson vs. Western Union Tel. Co., (Miss. 1901) 29 So. 787; 1 South. Dam. Sec. 15; Western Union Tel. Co. v. Hall, 124 U. S. 444; 37 Cyc. 1766. As stated by the court in McQuilkin v. Postal Tel. Co., (Cal. 1906) 151 Pac. 21, the damage is, as a matter of law, too uncertain and speculative, in that, the discretion of a third party to make or not to make the contract intervened. The situation in the instant case is to be distinguished from the case of A. S. Kenyon v. Western Union (Cal. 1893) 100 Cal. Dec. 454, where recovery was denied, not on the theory that the damages claimed were too remote, but on the theory that the appointment to office, even if secured by the plaintiff in that case would have been during the pleasure of the one making the appointment; and there was nothing to show that it would have been for a longer period than a day. This is an uncertainty not involved in the instant case. It might be noted also that in McQuilkin v. Postal Tel. Co., *supra*, an additional uncertainty existed which is not to be found in the instant case, i. e., the uncertainty as to the amount of profit that would have resulted to the plaintiff if the contract had been secured.

It must be agreed that the plaintiff in the instant case lost a valuable opportunity of securing an appointment through the negligence of the defendant. Whether or not the position would have been secured was a question which should have been left to the jury. Elam v. Western Union Tel Co. (1905) 113 Mo. App. 538. In the interesting case of Chaplin v. Hicks, C. A. (1911) 2 K. B. 786 the plaintiff was allowed to recover $500 because she had been deprived of a chance to win a prize in a beauty contest where there were fifty contestants, and twelve prizes offered. The decision reached in the instant case deprives a deserving plaintiff of a remedy which he should have, and does not encourage the exercise of due care on the part of telegraph companies. It rather permits them to violate with impunity an important duty owing to the public. The decision reached by the court in Western Union Tel. Co. v. Fenton, (Ind. 1875) 52 Ind. 1 is more in accord with public policy and indicates the *only means* by which the sendee of a telegram can protect himself against the negligence of those engaged in the business of transmitting messages.

W. E. BURBY.

RADIO ACT OF 1927

(Continued from page 8)

The case may very easily arise where waivers are filed by present operators, and a license not granted. The applicant will then be compelled to go to the courts on appeal, as provided by the new law, and he will enter upon such appeal handicapped by the waiver previously signed. Conceding that the operators have rights, it has been thought that the proper way to deal with them is to pay what they are worth in the event they are compelled to give them up. Should the commission fail to renew present licenses to existing stations, litigation will result. The chairman of the Air Law Committee, Mr. Chester W. Cuthell, a prominent New York attorney, believes the solution to this difficulty will suggest itself to members of the commission which has been appointed and is now functioning, and that they, following the recommendations of the American Bar Association Committee, will urge the passage at the next Congress of legislation which will remedy this very vital situation.

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

Book Reviews

By HARRY GRAHAM BALTER *of the Los Angeles Bar*

HOLMES AND BREWSTER'S FEDERAL TAX APPEALS; Kingman Brewster and James S. Y. Ivins. 1927. XXII and 944 pages. $10.00. John Bryne & Co., Washington, D. C.

A "Tax Problem" could quite appropriately be defined as, "That problem which the average lawyer hopes he will never have to face, but which he knows will eventually get him." Of course, the temerity of the lawyer in dealing with a tax problem lies in the fact that the field is so extremely technical and so utterly strange to the average practitioner.

For this reason, in this field of law, a lucid textbook is especially useful and helpful. *Holmes and Brewster's Federal Tax Appeals* treats of a very limited field of the law. It does not deal with the ordinary tax problems, which the layman or the lawyer who is not a specialist in tax matters would be very likely to meet. But rather, as the name of the book indicates, it treats of steps to be taken after the initial tax or assessment has been levied by some one of the many taxing agencies.

To the attorney who deals largely in taxation questions and who actually tries the cases before the various tax boards and tribunals, the new volume is indispensable. The book contains a wealth of important material. A recital of the contents will only give a fragmentary indication of the storeroom of material in the book. Part I deals with Procedure Preliminary to Appeal, and treats of (1) Procedure in Bureau of Internal Revenue, and (2) Selection of Remedies. Part II discusses Procedure in Board of Tax Appeals, and deals with (1) Legislative History (Revenue Act of 1926), (2) Jurisdiction, (3) Procedure at trial, (4) Evidence, and (5) Procedure after trial. Part III treats of procedure in Federal Courts and discusses (1) District Courts, (2) Court of Claims, (3) Circuit Courts of Appeals, and (4) Supreme Court. The appendix consists of: I. Rules of Practice—Board of Tax Appeals, II Rules of Practice—Federal Courts, III Provisions of Revenue Act of 1924 affecting Tax Appeals, IV Provisions of Revenue Act of 1926 affecting Tax Appeals, V Provisions of Judicial Code and Revised Statutes affecting Tax Appeals, VI Excerpts from Congressional Committee Reports, VII Forms of Internal Revenue Bureau Letters, VIII Forms of Board of Tax Appeals—Official, IX Forms in Federal Courts—Official, X Forms in Federal Court—From Precedents. Supplement—New Rules of Court of Claims.

The creation of the Board of Tax Appeals by the Revenue Act of 1924 brought new problems in the field of tax administration. The Revenue Act of 1926 eliminates the Federal District Courts as a step in the review of the board's decisions, and permits a direct appeal to the Circuit Courts of Appeals. Important questions have already arisen as to the limits of jurisdiction of the Board of Tax Appeals. (See article by Dana Latham in XV California Law Review, 199 *et seq.*). *Holmes and Brewster's Federal Tax Appeals* has given the whole subject of the Board of Tax Appeals adequate and fruitful discussion.

It is apparent from this survey that the book is exhaustive and complete. It is an excellent work in a very specialized field.

STOCK WITHOUT PAR VALUE; Cornelius W. Wickersham of the New York Bar, with an introduction by Paul D. Cravath. 1927. XXVI and 188 pages. Mathew Bender & Co., Albany, New York.

It was after quite a few years of agitation on the part of the late Francis Lynde Stetson, a leader of note in the field of corporate structure and corporate reorganization, that the New York Legislature in 1912 passed the first statute in the United States that permitted stock without par value. Since then, thirty-seven other states, including California, have now authorized non-par value stock. This development resulted from a growing realization that stock with par value was often more likely to mislead the unwary than to protect the cautious investor.

With the increasing popularity of this form of stock structure, many novel problems have been presented for determina-

tion by our courts. As illustrative, note the series of important cases recently decided by the California Supreme Court on this very problem. (Del Monte Light & Power Co. v. Jordan, 196 Cal. 488, 238 Pac. 710; Westlake Park Investment Co. v. Jordan, 198 Cal. 609, 246 Pac. 807; Land Development Co. v. Jordan, 198 Cal. 346, 245 Pac. 187; see also 13 California Law Review, 483 *et seq.*).

Mr. Wickersham's small volume on *Stock Without Par Value* is interesting and helpful. As the author himself states, "The present work should not be regarded as an encyclopedia or a digest, or an attempt to describe how to organize a corporation or to amend an existing charter so as to authorize the issue of stock without par value, or the proceedings and detailed requirements of particular statutes under which corporate proceedings must be had. It is not a compilation of statutes. On the contrary it is intended only as a discussion of some of the cases and questions which have arisen or may arise in connection with this class of stock."

The principal subjects dealt with are: I Origin and Nature (of non-par stock); II The Statutes; III Validity and Effect of the Statutes; IV Consideration (for non-par value stock); V Capitalization; VI Taxation. As the style of the volume is more of a commentary than a digest, it makes easy reading, and the entire book can be read in a few hours.

A number of pages are devoted to discussing the recent decisions on non-par stock in California, under the heading of "Partial Invalidity in California." Summarizing the present state of our law, Mr. Wickersham concludes that, "The effect of the foregoing decisions appears to be that a California corporation desiring to have shares without par value may so provide, by proper proceedings to that end, if it has no shares of par value, and that the statute is invalid under the California constitution in so far as it purports to authorize duality of stock, that is, with and without par value, but that a foreign corporation with both classes of stock is entitled to do business in California and to be licensed to that end, although by so doing, it may and presumably will subject its stockholders to liability for its debts upon a basis with respect to their proportionte liability therefor which will be worked out by the California courts in a proper case." (p. 36.)

Municipal Court Judgeships

(Continued from page 13)

It is therefore that I ask that the attorneys actively support the candidacy of the following: Dudley S. Valentine, Georgia P. Bullock, Guy F. Bush, Louis P. Russill, Leonard Wilson, Charles B. MacCoy, R. Morgan Galbreth, Chas. E. Haas. In all of these cases there is a contest on. The balance of the ticket is unopposed. The fact that it is unopposed is undoubtedly due to the moral support which the general public is gradually giving to the attempt upon the part of the Bar Association to effectively and efficiently fight for a free and independent judiciary, one that is not tied by any strings of endorsement of financial assistance to any attorney or group of attorneys or any political or other financial groups. The election is sought of a list of judges who are chosen because of their integrity, because of their ability, and because of their qualifications for the bench. It is necessary that we have funds to make the campaign a success. If the attorneys will stand by the Bar Association in this and probably one or two more fights, the Bar Association will undoubtedly be able to convince all of its critics of the fact that it is prompted solely by an honest desire to prevent men who are not qualified from securing a place upon our bench, and once the public becomes convinced of the sincerity and honesty of motive back of the Bar Association's plebiscite, it will be impossible for a man who lacks sufficient qualifications to secure the Bar Association's endorsement, to be able to secure election to the bench by reason of the financial support given to him by any special interest.

I wish to urge every one to forward his check directly to the Campaign Committee in the Consolidated Realty Building. If this is not done, we shall not be able to successfully carry on this program to completion.

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* A list of special committee assignments will appear in the next issue of the BULLETIN.